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MBf FINANCE BERHAD

v.

TEE KEE TAT & 2 ORS.

HIGH COURT MALAYA, KUALA LUMPUR

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DATO' SITI NORMA BTE YAAKOB J.

[CIVIL APPEAL NO. R2-12-240-92]

3 SEPTEMBER 1994

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CO-OPERATIVE SOCIETIES: Claim for return of loan - Whether cause of action premature - Claim filed before dispute referred to Registrar-General of Co-operative Societies - Consent to sue obtained before hearing - Consideration of s. 49(1) Co-operative Societies Act 1948 - Whether plaintiff had the right to sue.

CONTRACT: Claim against guarantors - Guarantors claiming that loan disbursed before agreement signed - Whether consideration for the guarantee was past consideration.

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The respondents were sued for the return of a loan that had been granted to the first respondent and payment of which had been guaranteed by the second and third respondents. At the trial Court the respondents contended that at the time of filing the suit the appellant had not referred the dispute over the debt to the Registrar-General of Co-operative Societies as required under s. 49(1) of the Co-operative Societies Act 1948 (the Act) and that as such the cause of action had not arisen.

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The second and third defendants further contended that as the loan amount was disbursed before the signing of the guarantee, the consideration for the guarantee was past consideration and as such was not valid. The learned Magistrate dismissed the claim and the plaintiff appealed.

Held:

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[1] Section 49(1) & (2) of the Act are only applicable to the first respondent and not to the second and third respondents who are not members of the co-operative society and as such the argument that the appellant's claim is premature must be directed to the appellant's claim against the first respondent only.

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[2] In any event s. 49 makes no mention of any time frame when the reference should be made and neither does it specify that such reference and the directive of the Registrar-General are to be conditions precedent before a suit can be filed in Court. All that the section provides is for the need of a reference to be made, after which the Registrar-General shall dictate the next course of action to be taken.

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[3] In this instance, the Registrar-General had directed that the dispute be referred to Court and whilst it is true that the appellant had no capacity to sue at the time the proceedings were filed, at the time of the trial, the reference had long been made and the directive had also been obtained and at that point in time the appellant was already clothed with the capacity to sue.

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[4] There was no reason to doubt the appellant's evidence that the agreement had been signed on 6 February 1986, particularly where there is evidence to show that the first respondent was in receipt of the loan on 6 February 1986. As there is evidence to show that the date of the agreement had been mistakenly written, the contention of past consideration becomes a non-issue. Even on the alternative plea of the appellant, there

is ample evidence to show that there was already an agreement in existence between the parties on 6 February 1986, and this fact alone negatives the respondents' contention that there is past consideration given for the loan.

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[5] The first respondent's contention that he never received the loan, was without merit as there is evidence to show that the cheque for the loan was made in favour of the first respondent and that he had acknowledged receipt of it. The fact that the first respondent chose to bank in the cheque into the account of a third party does not affect his liability to make repayment on the loan following his default.

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[Appeal allowed with costs].

[Ed. Note: The co-operative society referred to in the judgment was one Koperasi Mewah Berhad which went into receivership and was taken over by Kewangan Usahasama Makmur Berhad. The present appellant took over the assets and liabilities of Kewangan Usahasama Makmur Berhad pursuant to the consent obtained from Bank Negara].

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Legislation referred to:

Co-operative Societies Act 1948, s. 49(1), (2)(c)

For the appellant - M. Thomas Philip; M/s. Raja, Darryl & Loh

For the respondents - Saran Singh; M/s. Saran Singh & Co.

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JUDGMENT

Siti Norma Bte Yaakob J:

The appellant in these proceedings had sued the 3 respondents for the return of a loan that had been granted to the 1st respondent and payment for which had been guaranteed by the 2nd and 3rd respondents. The appellant's claim was, however, dismissed with costs by the Magistrate on the grounds:

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(1) that the causes of action against the respondents have not arisen yet.

(2) that there had been past consideration given for the loan.

The appellant is a co-operative society registered under the Co-operative Societies Act 1948 (the Act). The 1st respondent was a member of the appellant at the material time and had requested for a RM10,000 loan from the appellant. The loan is evidenced by a letter from the appellant dated 2 February 1986, approving the loan subject to the terms and conditions contained in the approval letter and a memorandum of agreement for loan dated 8 February 1986, (the agreement). Under paragraph 7 of the approval letter, the securities for the loan were to be provided by the personal guarantees of the 2nd and 3rd respondents and this is evidenced by clause 4 of the agreement, whereby the 2nd and 3rd respondents gave an undertaking that they would indemnify the appellant for all loss suffered by the appellant resulting from the 1st respondent's default.

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As the appellant is a co-operative society, the right to claim the debt due from its member, the 1st respondent and the principal borrower, is governed by s. 49(1) of the Act which makes it mandatory for the appellant to refer the dispute over the debt to the Registrar-General. On receipt of such reference, the Registrar-General may, under subsection (2) of the same section, either:

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(a) decide the dispute himself,

(b) refer it for disposal to an arbitrator or arbitrators, or

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(c) require the parties concerned to refer the dispute to a Court.

a In this instance, the Registrar-General acted under s. 49(2)(c) by issuing a letter dated 4 April 1987, directing the parties to refer the dispute to Court.

In fact, the appellant had already pre-empted the letter by filing the present proceedings in the Magistrates Court on 30 September 1986, well before the right to sue had accrued. This had led the Magistrate to hold that the appellant's claim against all the 3 respondents is premature as s. 49(1) of the Act had not been complied with by the appellant.

b To begin with, s. 49(1) and (2) of the Act are only applicable to the 1st respondent and not the 2nd or 3rd respondents who were not members of the appellant and, as such, the argument that the appellant's claim is premature must be directed to the appellant's claim against the 1st respondent only. The 1st respondent contends that the reference under s. 49(1) and the directive under subsection (2) should be obtained from the Registrar-General before the suit is filed, a contention which the Magistrate appears to be in complete agreement with.

c I do not consider this contention to be correct, as s. 49 makes no mention of any time frame when the reference should be made, neither does it specify such reference and the directive of the Registrar-General to be conditions precedent before a suit can be filed in Court. All that the section provides is for the need of a reference to be made, after which the Registrar-General shall dictate the next course of action to be taken. In this instance, he had directed that the dispute be referred to Court and whilst it is true that the appellant had no capacity to sue at the time the proceedings were filed, however, at the time of the trial on 1 August 1991, the reference had long been made and the directive had also been obtained and at that point of time, the appellant was already clothed with the capacity to sue.

d As to the 2nd and 3rd respondents' contention, that there was past consideration for the loan, this stems from the fact that although the agreement is dated 8 February 1986, the loan had already been released to the 1st respondent on 6 February 1986, and by this conduct, the respondents contend there was past consideration given for the guarantees.

e Having foreseen this objection, the appellant had taken 2 courses. The first is to lead evidence that the agreement had been wrongly dated, as all the parties to the agreement had executed the agreement in the appellant's office on 6 February 1986, and not on 8 February 1986, as the 1st respondent was rather anxious to get the loan and it was to accommodate him that the agreement was executed earlier than intended.

f I have no reason to doubt the reason given by the appellant, particularly where there is evidence to show that the 1st respondent was in receipt of the loan on 6 February 1986. As there is evidence to show that the date of the agreement had been mistakenly written, the contention of past consideration becomes a non-issue.

g Apart from the agreement, the appellant has already pleaded in the alternative that its causes of action against all 3 respondents are dependent on the approval letter dated 2 February 1986, which contains the terms and conditions that were later embodied in the agreement. The terms and conditions in the approval letter were accepted by the 1st respondent on 6 February 1986, and it was following this acceptance that the agreement came to be executed, and bearing in mind that the 1st respondent was anxious to get the loan, there is further reason to believe that the agreement was executed on 6 February 1986. From the alternative plea, there is ample evidence to show that there was already

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an agreement in existence between the parties on 6 February 1986, and this fact alone negatives the respondent's contention that there is past consideration given for the loan.

Lastly, the 1st respondent contends that he never received the loan as the cheque that was made in payment was banked into the account of a third party. I find no merit for this contention as there is ample evidence to show that, firstly, the cheque for the loan was made in favour of the 1st respondent and, secondly, he had acknowledged receipt of it on 6 February 1986. The fact that he chose to bank in the cheque into the account of a third party is of no concern to the appellant and neither does it affect the 1st respondent's liability to make repayment on the loan following his default, which is in no way disputed.

Resulting from my findings, I had allowed the appellant's appeal with costs.

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